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The Supreme Court of the United States

OCTOBER 1990 TERM

FLOYD B. KERSEY,
Petitioner,

- v. -

FLORIDA

PETITION FOR WRIT OF CERTIORARI TO THE SECOND DISTRICT COURT OF APPEAL, STATE OF FLORIDA.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE FAILURE OF THE DEFENDANT AND HIS COUNSEL TO OBJECT TO THE TRIAL COURT'S EXCLUSION OF THE GENERAL PUBLIC, INCLUDING DEFENDANT'S RELATIVES, DURING THE TESTIMONY OF THE COMPLAINING WITNESS IN A SEX ABUSE CASE WAIVES THE DEFENDANT'S RIGHT TO A PUBLIC TRIAL UNDER THE SIXTH AMENDMENT?

II. WHETHER IN THE ABSENCE OF AN OBJECTION BY THE DEFENDANT A TRIAL COURT IS RELIEVED OF ITS DUTY TO JUSTIFY CLOSURE BY COMPLIANCE WITH THE TEST SET FORTH IN *PRESS-ENTERPRISE I* AND *WALLER V. GEORGIA*?

III. WHETHER THE EXCLUSION OF THE GENERAL PUBLIC DURING THE TESTIMONY OF THE COMPLAINING WITNESS, OTHER THAN THE PRESS AND RELATIVES OF THE VICTIM, CONSTITUTES A PARTIAL CLOSURE RATHER THAN A TOTAL CLOSURE, THUS JUSTIFYING THE EMPLOYMENT OF A SUBSTANTIAL AS OPPOSED TO A COMPELLING REASON FOR CLOSURE?

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REFERENCE TO OFFICIAL REPORTS OF DECISIONS DELIVERED IN THE CASE

The official opinion of the Second District Court of Appeal of the State of Florida delivered in this case is found at 576 So.2d 300 (Fla. 2d DCA 1990). The order denying the Defendant's request for a rehearing is unreported. (A-3)

JURISDICTION

The judgment of the Second District Court of Appeal of the State of Florida sought to be reviewed was entered on December 14, 1990.

The Defendant's timely request for a rehearing was denied by the Second District Court of Appeal on March 5, 1991.

This Court has jurisdiction to review the judgment in question by writ of certiorari pursuant to statutory provision 28 USC §1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

SIXTH AMENDMENT
CONSTITUTION OF THE UNITED STATES

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

FLORIDA CONSTITUTION
ARTICLE I, SECTION 16(a)

In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation against him, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed. If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient; but before pleading the accused may elect which of those counties he will be tried. Venue for prosecution of crimes committed beyond the boundaries of the state shall be fixed by law.

FLORIDA CONSTITUTION
ARTICLE 1, SECTION 16(b)

Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.

SECTION 918.16, FLA. STAT. (1987)

In the trial of any case, civil or criminal, when any person under the age of 16 is testifying concerning any sex offense, the court shall clear the courtroom of all persons except parties to the cause and their immediate families or guardians, attorneys and their secretaries, officers of the court, jurors, newspaper reporters or broadcasters, and court reporters.

STATEMENT OF THE CASE AND FACTS

A. Proceedings Below.

Floyd B. Kersey was charged by State Attorney Information with the commission of the crimes of Burglary, Sexual Battery and False Imprisonment, alleged to have been committed on August 11, 1988.

Kersey plead not guilty to the allegations and proceeded to jury trial, which commenced on October 30, 1989 before the Circuit Court of the Sixth Judicial Circuit, Pasco County, Florida. At the conclusion of the four-day trial, the jury returned verdicts of guilty on all counts. Judgment was entered and Kersey was sentenced to a term of imprisonment of 17 years.

No objection was made in the trial court by either the Defendant or his trial counsel to the closure of the Defendant's trial to the general public, including his relatives, during the testimony of the complaining witness.

A Notice of Appeal of the Judgment and Sentence was filed in the District Court of Appeal for the State of Florida, Second District Case No. 89-3294. The federal question, denial of Defendant's Sixth Amendment right to a public trial, was raised for the first time before the Second District Court of Appeal in Defendant's direct appeal. Briefs were filed and oral argument was presented before a panel of the District Court of Appeal. Specific assignments of error on appeal have been abolished in Florida. Fla.R.App.P. 9.040(e) Appellate issues are raised by the notice and are framed in the briefs. Included in the Appendix herein are relevant portions of Defendant's Intitial Brief (App.), appended for the limited purpose of showing the issue was raised before the appellate court.

The Second District Court of Appeal affirmed the Judgment and Sentence without comment in a per curiam decision dated December 14, 1990. The per curiam affirmance implicitly determined the Defendant waived his constitutional right by a failure to object.

Kersey filed a timely motion for rehearing, clarification and certification as well as a motion for rehearing *en banc* on December 28, 1990, seeking an explicit opinion clarifying the basis for the decision. (App.) All of Kersey's motions were denied without comment by an order of the Second District Court of Appeal on March 5, 1991.

The District Court declined to provide an explanation, and it failed to provide a plain statement of any other adequate and independent state ground upon which the decision could be based. The Defendant was precluded from taking any further discretionary appeals to the Florida Supreme Court by the lack of a written opinion. Accordingly, the decision of the Second District Court of Appeal was the decision of the state court of last resort. The con-

stitutional questions regarding Defendant's public trial rights and waiver were timely and properly raised in the appellate court below and this court has jurisdiction to review the judgment on writ of certiorari.

This Petition for Writ of Certiorari followed.

B. Facts.

After jury selection and the presentation of opening statements, but prior to the introduction of any testimony, the trial court in open court, and in full view of the jury ordered that the general public be excluded from the courtroom during the testimony of the first witness, the alleged victim in the case. The full text of the colloquy is set forth below:

THE COURT: By reason of the nature of the testimony, all persons not directly related to the witness, all persons not witnesses, are hereby excluded from the courtroom. All persons are hereby excluded from the courtroom except for the press and except for those either parents or spouse of the victim. All other persons must leave the courtroom, all but the victim. Okay. You may proceed.

MR. ATTRIDGE: Judge, these people are not related to the victim.

UNIDENTIFIED PERSON: We're the grandparents.

MR. ATTRIDGE: They're not related to the victim.

THE COURT: They're excluded from the courtroom. All persons not related to the victim are hereby excluded from the courtroom by reason of the constitutional amendment on victim's rights. All persons are excluded from the courtroom unless they're the spouse of the victim.

THE DEFENDANT: Grandpa, you're not a victim.

MR. ATTRIDGE: May it please the Court.

(Appendix p.16; R134, lines 24-25; R135, lines 1-17)

The story then unfolds as follows:

Floyd Kersey had been dating a young lady named Theresa Looney. (R461, lines 12-15; R138, lines 8-10) Theresa Looney and Cheryl Peters were best friends. (R147, line 1) The night before the alleged criminal incident Theresa Looney and Cheryl Peters had partied with some of their girlfriends who were soon departing for college. (R137) By pre-

arrangement, Theresa Loonev did not go home after the party, but instead spent the night at Cheryl Peters home (R137) as she had done many times before. (R462, lines 10-14) The plan was for Floyd Kersey to pick Theresa Looney up the next morning at the Peters' home and take her to work (R138) at his business, Kersey Glass Company. (R529, lines 21-24)

On the morning of the alleged incident, at about 7:45 a.m. (R536, lines 9-11), Kersey telephoned the Peters' residence, as was planned, to wake Theresa and let her know he was on the way. (R534-536) Cheryl Peters answered the phone. (R139, line 3)

Kersey and Peters had attended the same high school (529, lines 15-20; R186, lines 1-2) and they had had frequent social contacts. (R520) The extent of their prior personal relationship was in dispute during the trial.

Kersey testified that he had had prior sexual relations with Cheryl Peters. (R545, lines 19-22) Cheryl Peters admitted going to his place on business quite a bit (R187, lines 4-7), but she denied even engaging in prior sex with him. (R668, lines 13-16)

The content of the phone conversation, when Peters answered Kersey's call, was disputed. Kersey said Peters led him to believe that she wanted him to return to her residence after picking up Looney and leaving her at work. (R541, lines 15-18); R542, lines 7-10) Kersey understood this to mean Peters wanted to fool around, (R543, 544) probably oral sex. (R555) Peters denied making such an invitation or suggestion. (R668, lines 17-20)

In any event, Kersey drove to the Peters residence. (R546, lines 4-6) He passed Cheryl Peter's mother as she was going to work and they exchanged hand waves in the driveway. (R263, lines 7-12)

After getting Theresa Looney and taking her to work, Kersey drove the vehicle he was using (his father's truck) to the parking lot of the local McDonald's and parked it. (R549, lines 21-25) He took a taxi back to the Peters' home. (R550, lines 5-14) He did not attempt to hide his identity from the cab driver. (R550, lines 17-19) Kersey testified he had an escalating cocaine problem and had used a substantial amount that morning. (R601, lines 22-25; R602, lines 1-17; R604-606) Kersey entered the residence through the unlocked door. (R551, lines 3-6) According to Kersey, he proceeded to Cheryl's bedroom where she was awaiting him. After some kissing (R554, lines 19-24) Cheryl attempted to perform oral sex on Kersey, but he was unable to perform. (R44, lines 3-12) He was upset by his inability to perform, left Cheryl's bedroom (R556), went into the kitchen and did some more cocaine. (R559, lines 4-13) Cheryl got dressed and came into the kitchen where they talked. (R559) Cheryl then drove him back to his car. (R564, lines 23-25; R565, lines 1-4)

According to Cheryl Peters, after she answered the phone call on the morn-

ing of August 11, 1988 she proceeded to awaken Theresa, who was sleeping in another bedroom, and told her Kersey was on his way to pick her up. (R139) Cheryl Peters then went back to sleep. (R139, lines 22-24) Her next recollections were as follows. Somebody came into her bedroom while she was sleeping and caused her to wake up. (R141) He covered her whole body with her comforter. (R142, line 2) He tucked the edges underneath her. (R142, line 8) She was able to breathe. (R196, line 16) Fighting began, which she acknowledged starting. (R142, line 22) When she pushed up she felt the person. (R143, line 3) It was like he was sitting (R143, line 16) or kneeling on her. (R144, line 20) When she began screaming he began punching her through the comforter. (R143, line 24; R144, line 1) She described the contact as being in the lower jaw (R144, line 9) or face area. (R169, line 9) She said she felt being struck 5-6 times. (R144, line 7) The only description she gave of it was that 'it hurt'. (R197, line 18) She could feel his hands on her shoulders trying to keep her down. (R196, line 9) She felt him grab her head and jerk it to the side 4 or 5 times. (R145, line 7) She thought he was trying to break her neck. (R144, line 22) Her comment when asked to describe whether it was painful was to say that 'for a couple of weeks after that I could barely move my head. I could move it to a certain extent side to side but it hurt.' (R145, line 9)

The person then picked her up off the bed and moved the two of them to the floor beside the bed. (R145, line 17) Ms. Peters said the move to the floor did not hurt. (R210, line 15) While on the floor the person tied her ankles together and her wrists together. (R146, line 24)

She said he used his shirt to tie the ankles and a phone cord to tie her wrists. (R151, line 13) He tried to tie these together with a sheet. (R217, line 10) He then lifted her back on the bed. (R157, line 8) He doubled her up some like getting her knees in a sitting position. (R159, line 2) He put his finger into her vagina. (R159, line 20) There was no other sexual activity. (R208; R220) Then he put her on all fours. (R160, line 11) He grabbed her by her hips and started thrusting her down to where the back of her head was hitting the mattress. (R161, line 4) She panicked and fought so hard that she knocked them off the bed. (R162, line 3) He fought to keep the comforter around her. (R163, line 1) He kept rubbing her and trying to make sure she was still tied. (R163, line 3) At one point during the occurrence she stated to the assailant that she could see him although she actually was unable to do so. (R163, lines 13-25; R164, lines 1-7) He then stopped and went and sat in the corner. She removed the comforter and saw it was Kersey. (R164, lines 8-13) Kersey told her to get dressed and he left the room. (R165, lines 8-9) She got dressed (R165, lines 10-11) and went into the dining room, where he was. (R171, line 11) She said he did four lines of cocaine on the kitchen table. (R171, line

20) She then drove him back to his truck. (R172, lines 2-7)

Both parties agree that when they arrived at the parking lot they discovered Theresa Looney there, parked right next to Floyd's vehicle. (R484, lines 13-22) Theresa had become concerned about Floyd's whereabouts and went to look for him. (R483, line 25; R484, lines 1-7) Cheryl Peters quickly dropped off the Defendant then went to her grandparent's house. (R173, line 8) She told her grandfather someone tried to kill her. (R173, lines 10-12) The police eventually came. (R173, lines 17-19) Before they arrived Theresa Looney came to the Peter's grandparent's house. The two women had a conversation in a separate room. (R173, lines 20-25; R174, lines 1-5)

Cheryl Peters stated that Theresa was very upset (R174, lines 9-10) and kept asking for Cheryl not to tell that it was Kersey. (R175, lines 21-24) Theresa denied that statement. (R497, lines 6-12) Theresa said she went to speak with Cheryl to find out what she was doing with her boyfriend. (R490, lines 24-25; R491, line 1)

Cheryl Peters did not at first tell the police that Kersey was the assailant. (R177, lines 7-9) Eventually, she did. (R178, lines 3-5) Photographs were taken of her by the police approximately two hours after the incident happened. (R178, lines 21-23) She said the pictures (Exhibit 12) accurately showed the injuries to her lips, eyes and jaws. (R199, line 13) She said the police offered to take her to the doctor but she declined. (R20, line 1) She never went to a doctor for any type of injury because she didn't need a doctor. (R202, line 2)

SUMMARY

The United States Supreme Court has never decided whether a criminal defendant waives his Sixth Amendment right to a public jury trial by failing to object when a trial judge wrongfully orders a crucial portion of the trial testimony to be closed. Without the guidance of this Court, the state and federal lower courts have fashioned conflicting interpretations of this constitutional issue.

Those lower courts which have held this right to be waived by failing to object apparently do not believe the right to public trial to be very significant; however, such a position is contrary to the historical analysis of this right provided in the series of Supreme Court recent decisions over the past decade. If the right to a public trial is basic to our system of justice then, like other important constitutional rights, it should not be lost by a mere failure to object. A knowing and intelligent, personal waiver should be required. Consideration of this Petition would provide an opportunity specifically to address the waiver question by placing the right to a public trial in the hierarchy of constitutional rights. If it is an important right this Court should not allow it to be waived by mere silence.

Moreover, consideration of the Petition would clarify lower court decisions which conflict with this Court's analysis regarding the basis of the public trial right. Through various decisions this Court had developed a consensus which finds that the right to a public trial is rooted in the historical presumption of openness of trial proceedings. The Court has ruled that trial proceedings may not be constitutionally closed to the public unless this historical presumption is rebutted. Lower court decisions which declare that a courtroom may be closed if a defendant neglects to object fail to consider the historical presumption of openness. The presumption must be rebutted regardless of whether a defendant objects in order for a closure to be consistent with this Court's constitutional commands.

Even if the defendant acquiesces in a courtroom closure a trial judge has a duty to rebut the presumption of openness by compliance with the tests required by this Court's public trial decisions. The duty arises because the general public has an independent right to attend criminal trials. This right has been derived from the First Amendment, but only because the right of the public to attend trials has always been considered together with the right of the press to have access to criminal proceedings. While this Court has never been required to decide whether the public has an independent right to attend trials explicitly grounded in the Sixth Amendment, Justices White, Blackmun and Marshall have opined in dissenting and concurring opinions that the public does have such a right. Much of the confusion in the analysis

of the public trial right has occurred because the Court has not been able to straightforwardly hold that the public's right is founded in the Sixth Amendment. The present case provides a unique vehicle to address the question.

The United States Supreme Court has held that the public may not be excluded from the courtroom unless the party seeking closure establishes an overriding or compelling interest sufficient to rebut the presumption of openness. Some circuit courts of appeal, however, have seemingly diluted this holding by developing a less-stringent test. They distinguish this Court's holding by finding only a "partial closure" of a trial proceeding. If the length of the closure is limited, of if some portion of the public is allowed to attend then the lower courts hold that only a "substantial" reason must be advanced in order to exclude the public. Whether or not these courts are correct in their attempt to distinguish a constitutional requirement imposed by this Court is an issue of obvious importance, which could be resolved if this Petition for Writ of Certiorari is granted.

ARGUMENT I

WHETHER THE FAILURE OF THE DEFENDANT AND HIS COUNSEL TO OBJECT TO THE TRIAL COURT'S EXCLUSION OF THE GENERAL PUBLIC, INCLUDING DEFENDANT'S RELATIVES, DURING THE TESTIMONY OF THE COMPLAINING WITNESS IN A SEX ABUSE CASE WAIVES THE DEFENDANT'S RIGHT TO A PUBLIC TRIAL UNDER THE SIXTH AMENDMENT?

The jury was chosen, sworn in, and seated. Opening statements were completed. The testimony was about to begin in a central Florida courtroom in the rape trial of Floyd Kersey. Cheryl Peters, the alleged victim, was called into the courtroom. She took the oath. Before she began her testimony, the trial judge suddenly blurted out, in full hearing of the jury:

THE COURT: By reason of the nature of the testimony, all persons not directly related to the witness, all persons not witnesses, are hereby excluded from the courtroom. All persons are hereby excluded from the courtroom except for the press and except for those either parents or spouse of the victim. All other persons must leave the courtroom, all but the victim. Okay (to prosecutor). You may proceed. (Appendix p.16)

The prosecutor, Mr. Attridge, unsatisfied with the extent of the exodus, chimed in, initiating the following colloquy:

MR. ATTRIDGE: Judge, these people are not related to the victim.

UNIDENTIFIED PERSON: We're the grandparents.

MR. ATTRIDGE: They're not related to the victim. (Appendix p.16)

The Court, without inquiry or the opportunity for the grandparents to provide an explanation or make an objection to their ejection, ruled:

THE COURT: They're excluded from the courtroom. All persons not related to the victim are hereby excluded from the courtroom by reason of the constitutional amendment on victim's rights. All persons are excluded from the courtroom unless they're the spouse of the victim. (Appendix p.16)

While defense counsel sat silently by, his client, Floyd Kersey, revealed the identity of the grandparents who were so reluctant to leave the courtroom:

THE DEFENDANT: Grandpa, you're not a victim. (Appendix p.16)

The trial court expelled the general public and the Defendant's grandparents from the courtroom in full view of the jurors. The Court announced

that this expulsion was based on a constitutional amendment on victim's rights. No such amendment or law existed.[1] Defense counsel just sat silently by. Given no choice by the court and aware of no alternatives the Defendant lost the support of his relatives. The grandparents reluctantly left and were denied the opportunity to hear the most crucial testimony in the trial of their grandson.

The United States Supreme Court has yet to address the question of whether the failure of the Defendant or his counsel to object to a trial court's order excluding the general public from a portion of a trial constitutes a waiver of the Defendant's right to a public trial under the Sixth Amendment. The Court should decide this question in order to eliminate conflicting lower court opinions on this federal question by clarifying the appropriate standard for waiver, and in order to bring full circle the Supreme Court's historical analysis of the public trial right by emphasizing its proper place in the hierarchy of rights of constitutional importance.

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1 It is impossible to explain the basis for this statement. Florida provides for public criminal trials by constitutional amendment:

> In all criminal prosecutions the accused shall, . . . have the right to . . . a speedy and public trial . . . Art. I, §16(a), Fla. Const.

Florida did adopt a constitutional amendment concerning victim's rights in 1988 which reads;

> Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused. Art. I, §16(b), Fla. Const.,

but the amendment did nothing to modify the defendant's right to a public trial under the State constitution, and would have been ineffective, at any rate, to effect the defendant's rights under the sixth amendment to the United States Constitution.

Perhaps the court confusedly combined the amendment concerning victim's rights with Section 918.16, Fla. Stat. (1987), set forth below, which permits the exclusion of some classes of spectators in sex abuse cases involving children:

> In the trial of any case, civil or criminal, when any person under the age of 16 is testifying concerning any sex offense, the court shall clear the courtroom of all persons *except parties to the cause and their immediate families* or guardians, attorneys and their secretaries, officers of the court, jurors, newspaper reporters or broadcasters, and court reporters. (emphasis added)

The statute was inapplicable, however, because the complaining witness was 19 years of age, and since the relatives of the defendant were excluded. Even if the statute was applicable, a mandatory exclusion without a case-by-case analysis would be unconstitutional. *Globe Newspaper Co. v. Superior Court*, 457 US 596, 102 S.Ct 2613, 73 L.Ed.2d 248 (1982) No matter the rationale for the judge's statement, the articulated basis for the exclusion of the public clearly was erroneous.

There is no question the trial court's exclusion of the general public, including the Defendant's relatives, during the testimony of the complaining witness constituted a closure of the trial in violation of the Defendant's Sixth Amendment rights to a public trial. It is further apparent that the trial court failed to identify any overriding interest which would justify the closure, failed to consider other means of protecting that interest while protecting the right to a public trial and failed to articulate sufficient facts for appellate review of the decision. The trial court's justification for the closure was an erroneous assumption that there had been a new constitutional amendment concerning victim's rights which would allow him to close the courthouse doors to the general public. There is no such amendment either in the Federal or Florida Constitution.

Accordingly, in the total absence of justification for the closure, the only way in which the Second District Court of Appeal of the State of Florida properly could have affirmed the actions of the trial court was to determine on direct appeal that the failure of the Defendant and his counsel to object to the closure order of the court constituted a waiver of the Defendant's Sixth Amendment rights. This implied ruling of the Florida District Court of Appeal echoes the decisions of some other state courts of last resort on the same issue. For example, the case of *State v. Butterfield*, 784 P.2d 153 (Utah 1989), heavily relied upon by the State in its argument to the District Court, also determined that the right to a public trial can be waived by silence. There are, in contrast, cases from other jurisdictions which hold the opposite. See, *State v. Hensley*, Ohio St. 255, 266, 79 N.E. 462-464 (1906); *State v. Marsh*, 126 Wash. 142, 145-7, 217 P. 705, 706 (1923), which state that no waiver is effected by the failure to object.

This Court should entertain the waiver argument in order to resolve conflicting lower court decisions on this federal question. *Butterfield* articulated a reason for these contrary holdings:

> It is clear that a defendant may waive his or her right to a public trial under the sixth amendment of the United States Constitution. *Singer v. United States*, 380 US 24, 34-35, 85 S.Ct. 783, 789-790, 13 L.Ed2d 630 (1965); *Martineau v. Perrin*, 601 F.2d 1196, 1199-1200 (1st Cir. 1979); *United States v. Sorrentino*, 175 F.2d 721, 723 (3d Cir.), cert. denied, 338 US 868, 70 S.Ct 143, 94 L.Ed 532 (1949). However, as far as we can determine, the United States Supreme Court has not addressed the question of whether failure by a defendant and his or her counsel to object to a closure order constitutes waiver of this right under the sixth amendment. And we have not addressed the waiver issue under the Utah Constitution. In the absence of controlling authority, we

> undertake a review of other decisions on this general issue with a view to determining what appears to be the soundest position.

State v. Butterfield, 748 P.2d at 155

Kersey argues that the *Butterfield* court and the Second District Court of Appeal failed to adopt the soundest position because they failed to recognize the fundamental importance of the public trial right in our system of justice. Although the Supreme Court has never articulated the requirements for waiver or the right to a public trial, it has considered the requirements for waiver of numerous other constitutional rights.[2] The right to a public trial should join this list of constitutional guarantees for which this Court has promulgated specific requirements for waiver.

The present case gives this Court the perfect and unique vehicle to dictate such a specification. Although trial judges occasionally initiate closures, the judge's reason for closing the courthouse doors in this instance was clearly unfounded and erroneous. Therefore, the waiver question is squarely before this Court since the only way the closure could be affirmed is by virtue of the failure to object. Moreover, in the face of an unfounded basis for closure *both* the prosecution and defense would have to acquiesce in the closure in order for this particular question to reach the Court. The prosecutor did more than acquiesce. He affirmatively assisted in the emptying of the courtroom. Perhaps he was unaware the exclusion violated the Defendant's constitutional rights? Defense counsel certainly was unaware of the right because the presence of the public in the courtroom, especially the grandparents, could only have been advantageous for the Defendant. This unique interplay of unusual actions and non-actions by the participants provides an opportunity both on an intellectual and a personal level for this Court to vindicate a most basic constitutional right.

This Supreme Court, throughout its history, has infrequently entertained questions regarding public trial rights and has never addressed the waiver question presented by the instant scenario. It is not suprising that there has been a dearth of cases regarding public trials in general and the waiver question in particular because as it has been noted by historian, E. Jenks, A Short

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2 *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977)(admissibility of statements); *Henry v. Mississippi*, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965)(admission of illegally seized evidence); *Fay v. Noia*, 372 US 391 (1963)(decision not to appeal); *Johnson v. Zerbst*, 304 US 456 (1937)(right to counsel); *Patton v. United States*, 281 US 276, 50 S.Ct., 253, 74 L.Ed. 854 (1930).

History of English Law 3-4 (2d ed. 1922), the early Anglo-Saxon laws:

> . . . deal rather with the novel and uncertain, than with the normal and undoubted rules of law. Why trouble to record that which every village elder knows? Only when a disputed point has long caused bloodshed and disturbance, or when a successful invader . . . insists on a change is it necessary to draw up a code.

As quoted in *Richmond Newspapers, Inc. v. Virginia*, 448 US 555, 100 S.Ct. 2814 (1980), 565 L.Ed.2d 973.

Frankly, the constitutional right to a public trial is so historically ingrained in our fundamental notions of jurisprudence that it is often taken for granted. As noted in one of the first Supreme Court cases to entertain the issue, *Re: Oliver*, 333 US 257, 68 S.Ct. 499, 92 L.Ed 682 (1948), the court was "unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country." Nor could the court find any record "of even one such secret criminal trial in England since abolition of the court of star chamber in 1641." This Anglo-American tradition of invariably conducting judicial proceedings in public is derived from the earliest days of commonlaw trials in Great Britain and is honored not only by the Constitution of the United States, but also by constitutional provision, statute, or decision in 48 of 50 states. *Gannett Co. v. DePasquale*, 443 US 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979).

Simply put, this Court should grant the Petition for Writ of Certiorari because it has never considered whether a defendant's failure to object waives the right to a public trial, and because this vacuum has led to conflicting lower court positions on this federal question.

But there are other special reasons for reviewing the decision below. The right to a public trial has been characterized by some as an "amorphous right." See, *Jones v. Henderson*, 683 F.Supp. 917, 920 (E.D.N.Y. 1988). See also, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 602, n.1-2 (Blackmun, J. concurring). This Court recently has provided clarity and structure to the historical right as recognized in *Jones*.

In the late 1970's, a series of cases worked their way to this Court which provided an opportunity to explore the basis of the constitutional right. These cases developed an historical analysis for the underpinnings of the right and all concluded that it is a significant right. A brief analysis of this line of cases will show the initial divergence of opinion regarding interpretation of this basic right. The analysis will show the process of evaluation as the body of law coalesced into the present and prevailing view. Evaluating these cases illustrates the rough contours in this Court's definition of the "amorphous right." These gaps in clarity occurred because the precise issues necessary for their definition were not before the Court for resolution. Granting this Peti-

tion for Writ of Certiorari would provide a vehicle for addressing the gaps and for bringing the public trial analysis full circle, as well as for answering the previously unanswered question regarding the constitutional requirements for waiver thereby eliminating conflict in lower court decisions.

In *Gannett Co. v. DePasquale*, 443 US 368, 99 S.Ct. 2898, 61 L.Ed 2d 608 (1979), the accused, with the acquiescence of the state, persuaded the trial court to deny the press and public access to a pre-trial suppression hearing because the build up of adverse publicity jeopardized the defendant's right to a fair trial. On review, the court acknowledged that the Sixth Amendment permits and presumes open trials as a norm, but "there exists no persuasive evidence that commonlaw members of the public have the right to attend pre-trial proceedings; indeed, there is substantial evidence to the contrary." id at 387. This was so, the court reasoned, because public access to pre-trial proceedings may pose a hazard to the fairness of the trial and under the Sixth Amendment, public trials were clearly associated with protection of the accused not with an independent right of the public to attend trials. The opinion of Justice Stewart explicitly stated that members of the public have no constitutional right independent of an accused's public-trial right under the Sixth and Fourteenth Amendments. The court declined to decide whether there was a First and Fourteenth Amendment right to attend criminal trials. Instead, the court assumed that there was such a right and held that the trial court, under the circumstances of the case, had properly balanced the right of the accused to a fair trial against the right of the press and public to have access to pre-trial proceedings. In an opinion joined by four Justices, three of whom saw the need also to write separately, Justice Stewart found the trial court record in *Gannett* sufficient to justify closure. He found that the Sixth Amendment, by its literal terms, granted a right only to the defendant to insist on a public trial. He did not read the Sixth Amendment to embody a right in the public to attend criminal trials.

The *Gannett* decision was decided by 5-4 vote with Justices Blackmun, Brennan, White and Marshall dissenting, especially in regard to the non-applicability of the Sixth Amendment to the general public. Justice Blackmun's dissent, which three Justices joined without writing separate opinions, stated that the public enjoyed a Sixth Amendment right to attend trials. He derived this right from the tradition of open proceedings in commonlaw in England and America, and his view that the right to attend trials grew as an inescapable part of our system of trial by jury.

The historical approach that Justice Blackmun employed in the analysis of the public trial issue was carried through the next term when the Court considered the case of *Richmond Newspapers, Inc. v. Virginia*, 448 US 555, 100

S.Ct. 2814, 65 L.Ed.2d 973 (1980). The case did not involve pre-trial proceedings, but rather an entire murder trial closed to the public. The trial was closed at the request of the accused, with the concurrence of the state. The Court recognized that there was no explicit constitutional provision that the public had the right to attend trials. Nevertheless, in his majority opinion, Chief Justice Burger, following the historical rationale of the *Gannett* dissent, determined that there was an implicit constitutional protection for the public's right to attend criminal trials. The implicit protection was founded in a number of rights including the right of free speech, the right of free press, the right to peaceably assemble for the redress of grievances, the Ninth Amendment, and other penumbras of the Bill of Rights. Justice White concurred in the majority opinion but noted that the *Richmond* case would have been unnecessary had *Gannett* construed the Sixth Amendment to forbid excluding the public from criminal proceedings except in narrowly defined circumstances as argued by the dissenters.

The Court next took up the public trial issue two terms later in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982). The Court in *Globe Newspaper* marshalled five votes in support of an opinion adopting the *Richmond Newspaper's* proposition that the press and general public have a constitutional right of access to criminal trials under the First Amendment. The Court also held that the right was a limited one, and for the first time a majority erected a standard by which to measure closure requests. Justice Brennan's opinion joined by Justices White, Marshall, Blackmun, and Powell, found that "the state's justification denying access to a criminal trial must be a weighty one," and that where "the state attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest." *Id.*, 457 U.S. at 606-607. It should be noted that in *Globe Newspaper* this Court invalidated a Massachussetts statute which required mandatory exclusion of the public and press from trial of sex offenses involving victims under 18 years of age. The Court held that the interest of the state in protecting minor victims of sex crimes from trauma or embarrassment resulting from public testimony and encouraging victims to come forward and testify in a truthful and credible manner did not, by themselves, justify a mandatory rule of exclusion. But, the Supreme Court recognized that the courts were free to determine, on a case-by-case basis, whether secrecy was necessary to protect the minor victim from embarrassment.

The Court continued its analysis of public trial issues in *Press-Enterprise Co. v. Superior Court*, 464 US 501, 78 L.Ed 2d 629, 104 S.Ct. 819 (1984) (*Press-Enterprise I*), in which the trial court closed six weeks of jury voir dire

and refused press requests for transcripts of the jury selection proceedings. The record is not clear as to the status of an objection by the defendant but it is assumed that he did not object to the exclusion since he sought to block the release of the transcript of the proceedings. In *Press-Enterprise I*, the Court articulated a test to determine whether or not closure was appropriate:

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Id., 464 U.S. at 510.

In the 1984 term this Court considered for the first time a public trial issue brought by an accused and framed under the terms of the Sixth Amendment. In *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210 81 L.Ed.2d 31 (1984), the trial court closed a pre-trial suppression hearing over the objection of the accused. Although *Waller* did not present the issue of the public's right of access to suppression hearings, the court noted that in *Gannett* a majority of the Justices concluded that the public had a qualified constitutional right to attend such hearings. Accordingly, the court held that under the Sixth Amendment any closure of suppression hearings over the objection of the accused must be justified by a showing under the *Press-Enterprise I* test of an overriding interest based on findings that closure is not essential to preserve higher values and is narrowly tailored to serve that interest.

The final case in the analysis was in *Press Enterprise Co. v. Superior Court*, 106 S.Ct 2735, 92 L.Ed 2d 1 (1986)(*Press-Enterprise II*) in which at the request of the accused the trial court closed a 41 day preliminary hearing wherein the state presented evidence of probable cause. On review, the United States Supreme Court determined that First Amendment right of access to criminal trials was applicable to preliminary hearings.

This digressive review of the public trial issue is briefly illustrative of the gaps in the analysis of the Court which could, and should, be completed by granting certiorari and considering the arguments raised in this petition. The above line of cases attempt to balance the interrelated rights of the Defendant, the press and the public, to delineate the portions of a trial which may be closed and to specify the procedure that must be employed by a trial court before closure. The analytical review points up several areas of interest.

First, while the accused has a Sixth Amendment right to a public trial this Court has never held that the general public also has such a right grounded in the Sixth Amendment, despite the opinion of three Justices White, Powell and Marshall, presently sitting on this bench, who believe that they do. The

resolution of the precise question of the applicability of the Sixth Amendment to the general public has not been necessary to decide the public trial cases. The situations presented to the Court could be resolved on a narrower basis. Accordingly, it was never intellectually necessary to make the pronouncement that the public has a Sixth Amendment right to attend criminal trials. The instant case, especially as raised in the following Argument II, presents an appropriate vehicle for that issue to travel to this Court.

Second, a common thread running through the cases is that there is a *presumption* of openness upon which the public trial right historically is founded. In *Gannett* Justice Stewart in his plurality opinion noted that, "there is no question that the Sixth Amendment permits and even presumes open trials as a norm." *Gannett Co. v. DePasquale*, 443 U.S. at 385, 61 L.Ed.2d at 625. In *Richmond*, Chief Justice Burger noted in his majority opinion that:

> From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice.

Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 573, 65 L.Ed.2d 987. Justice Brennan quoted the above language with approval in his majority decision in *Globe Newspapers*, joined without comment by Justices White, Marshall, Blackmun and Powell. *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 619, 73 L.Ed.2d at 265. In *Press-Enterprise I* the court recognized that both criminal trials and their jury selection process were historically open to the public. From this historical underpinning the court established the rule necessary to rebut the presumption of openness. *Press-Enterprise Co. v. Superior Court*, 464 U.S. at 510, 78 L.Ed.2d at 638. The unanimous *Waller* court also quoted and approved the *Press-Enterprise I* test necessary to overcome the presumption of openness. *Waller v. Georgia*, 467 U.S. at 48, L.Ed.2d at 38.

It appears that Justices White, Blackmun, Powell, Rehnquist, Stevens and O'Connor adhere to the historically derived presumption of openness of trial proceedings constitutionally inherent in our system of justice. The *Press-Enterprise I* test must be satisfied in order to *rebut* the presumption of openness. Given the choice of language employed by the Court this presumption of openness would be sufficient to preclude *any* closure absent the required *Press-Enterprise I* showing. Such a showing would arguably be necessary to rebut the presumption even without an objection of the Defendant.

Finally, this Court has never been presented with a situation in which a Defendant remained silent in the face of a closure order. In *Globe Newspapers* the defendant specifically objected. (Note: the public trial issue was never raised in the context of the Defendant's rights in *Globe* due to his

acquittal) In *Richmond* and *Press-Enterprise I* the Defendants actually were the moving parties seeking closure. In *Waller* there was a mixture of objection and acquiescence among the multiple Defendants, four of whom specifically lodged an objection to closure and one who concurred in the prosecution's motion to close the suppression hearing. In a footnote to its decision, the Court opined that the concurring Defendant may be procedurally barred from seeking relief as a matter of state law. *Waller v. Georgia*, 467 U.S. at 42, n.2. Although, the Court has never been presented with a non-specific acquiescence there is an indication that it feels silence will not waive the right. As noted in a another footnote to Justice Powell's unanimous opinion in *Waller*:

> One of the reasons often advanced for closing a trial-avoiding tainting of the jury by pretrial publicity, e.g., Press-Enterprise . . . - is largely absent *when a defendant makes an informed decision to object* to the closing of the proceeding. (emphasis added)

Waller v. Georgia, id., at 47 n.6.

The first two points of interest from the public trial analysis-a specific Sixth Amendment right of the public to attend public trials, and the presumption of openness-will be discussed in following arguments. The lack of an objection to closure by Defendant in this case brings the present argument before this Court.

By analyzing how a defendant may waive the right to a public trial, this Supreme Court will bring full circle its analysis of the public trial issue by placing the right to a public trial in proper perspective. As indicated in the aforementioned cases, the decisions of the court were based upon an historical analysis of the fundamental nature of the right to a public trial as part and parcel of a right to a jury trial in our American system of jurisprudence. The *Butterfield* court acknowledged that their determination of the status of the right to a public trial guided whether the right could be waived by the failure to object. *State v. Butterfield*, 784 P.2d at 156. The *Butterfield* court then analyzed some important and basic rights such as the right to trial, the right to be present at trial, the right to a jury trial, and the right to an interpreter at trial. That court went on to pronounce "we judge the right to a public trial to be of a different order." *State v. Butterfield*, id. at 156. With all due respect to the *Butterfield* court, the first three rights together with the right to a public trial are all fundamental rights cut from the same cloth; but, to state that a right to an interpreter is of a different order than the explicit constitutional right to a public trial implicitly presuming the right to an interpreter is a more important or fundamental right, misplaces the historical position public trials hold in our system of jurisprudence. This Supreme Court may properly place

the right to public trial in the hierarchy of constitutional rights by deciding the test necessary to waive the right.

An evaluation of the importance of the right waived may be a material consideration in the determination of the need for a waiver on the record. This Court may decide that a defendant will lose the right to object to the secrecy of his trial unless he or his counsel makes a timely and definite objection. There are certain constitutional guarantees, for example, that can generally be waived by silence, such as the protection against illegal searches and seizures. In such cases a trial court would not be aware of a violation of the accused's rights unless the accused objected to the evidence. On the other hand, there are other constitutional guarantees, such as the right to a jury trial and the right to a presumption of innocence, which do not require objection in order to bring their violation to the attention of a trial court. The purpose of a contemporaneous objection is to bring a hitherto unknown situation or legal inequity before a trial judge so that he or she may have an opportunity to rule on, and perhaps correct, the alleged error. A trial judge should be deemed cognizant of these most-basic rights. An appellate court would not countenance a trial court's *sua sponte* denial of a defendant's right to a jury trial even in the face of a defendant's silent acquiescence.

This example is illustrated by a slight change in the scenario of the present case. Assume that at beginning of the trial the court announced *sua sponte* that it was excusing the jury and would itself fulfill the role of fact-finder. And also assume that neither the Defendant nor his counsel objected to the procedure. Finally assume that except for this otherwise extraordinary measure the trial was conducted fairly and equitably, and that an objectively accurate result was achieved. Would the result be approved upon review due to the acquiesence of the defendant?

Absolutely not. The waiver of this class of constitutional guarantee ordinarily requires an "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) The rationale for such a result is contained in a footnote to *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14, 88 S.Ct. 1444, 20 L.Ed.2d 491, 496-497 (1968) which explains why the States must comply with certain provisions of the Sixth Amendment.

> The limitation(s) imposed by the Sixth Amendment (are) not necessarily fundamental to fairness in every criminal system that might be imagined but (are) fundamental in the context of the criminal processes maintained by the American States . . .
> A criminal process which was fair and equitable but used no juries is easy to imagine. It would make use of alternative guarantees and protections which would serve the purposes that the jury

serves in the English and American systems.

No American State has constructed such an alternative system because the right to a jury trial, and Kersey would argue the right to a *public* jury trial, is a fundamental procedure necessary to our Anglo-American regime of ordered liberty.

If this Court concludes that the right to a public trial is such a fundamental right and essential to a fair trial, under our American system an intentional relinquishment of the right should not be found unless there has been an express waiver by the defendant or by his counsel. If the right is viewed as being significant, as suggested in all of the Court's opinions analyzing the public trial right, it should require an affirmative waiver from the defendant prior to the issuance of an exclusion order closing the courthouse doors.

If this Court grants this Petition for Writ of Certiorari and considers the arguments raised herein it will accomplish several purposes. By explicitly stating the requirements for waiver of the right the Court will determine the relative importance of the right in the constitutional order. Should it be classed together with the right to an interpreter and the exclusionary rule, or should it be considered as part and parcel of a defendant's overall Sixth Amendment rights to a fair trial? No matter its classification, by considering the waiver question the Court will secondarily provide a rule which will eliminate conflicting lower court interpretations of the federal constitutional right. Finally, consideration of the Petition provides an opportunity for this Court to bring full circle the unresolved public trial issues by entertaining the following arguments.

ARGUMENT II

WHETHER IN THE ABSENCE OF AN OBJECTION BY THE DEFENDANT A TRIAL COURT IS RELIEVED OF ITS DUTY TO JUSTIFY CLOSURE BY COMPLIANCE WITH THE TEST SET FORTH IN *PRESS-ENTERPRISE I* AND *WALLER V. GEORGIA?*

Should a judge be required to justify closure of a trial proceeding even if the defendant makes no objection? There are principles stated in this Court's public trial analyses that suggest it should. For example, the basis for the right to a public trial rests upon the historical presumption of openness of trial proceedings. If content is given to the Court command that trials are presumptively open, then the presumption must be rebutted before a courtroom may be closed. The mere acquiescence of one party cannot rebut the presumption because the right to attend trial is an interrelated right belonging both to the accused *and* the public. (And, additionally to the press as a sub-set of the public.) Neither can override the public trial right of the other without first rebutting the presumption of openness.

The precise question raised in this argument has never been presented to this Court and remains unanswered. The answer to the question requires a determination whether the public has a right to attend a criminal trial, interrelated with that of the defendant, founded on the Sixth Amendment. If the question is left unanswered then the principles touted by this Court will continue to have no practical substance.

The public trial analyses recognize the interrelationship of the rights of the defendant, the press and the general public to attend a criminal trial. In *Press-Enterprise I*, the court noted "for present purposes, how we allocate the right to openness as between the accused and the public or whether we view it as a component inherent in the system benefiting both, is not crucial." *Press-Enterprise Co. v. Superior Court*, 464 U.S. at 508. It is difficult to understand just what the Court meant by this statement. There is obviously an interrelationship or interplay between the rights of the Defendant, the press and the public. At times the exercise of the right creates conflicting concerns, as when a defendant argues adverse publicity might jeopardize his primary right to a fair trial. At other times the rights mesh perfectly as the interplay provides those salutary purposes described in *Gannett*:

> Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously, and generally give the public an opportunity to observe the judicial system.

Gannett Co. v. DePasquale, 443 U.S. at 383.

Moreover, to the extent that the general public consists of friends or relatives of the defendant, the interrelationship between the rights of the two, relatives and the defendant, becomes almost inseparable. The public trial right, inhering in both the defendant and the public, enables the accused to be accompanied at trial by friends and relatives that lend moral support and comfort. See, *Commonwealth v. Marshall*, 253 N.E.2d 333 (Mass. 1969). A family member has a right to attend a criminal trial founded in the right accorded the general public. It should be understood that the right of a family member to attend the trial of a defendant is not solely carved from the rights of the general public, but rests on a further and independent basis. Such a right inherently belongs to the defendant. The defendant has the right to the comfort and assistance of friends, relatives, and loved ones at trial. "And without exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged." *Re: Oliver*, 333 U.S. at 271-272. The defendant has a personal constitutional right to have his relatives present. They in turn have an independent constitutional right to be there.

Despite this interrelationship the Court has never ruled that the public as a whole has a right to attend public criminal trials explicitly grounded in the Sixth Amendment. Recall that four Justices, three presently sitting on this bench, have stated that the public does have such a Sixth Amendment right. If the public has such a right, then the trial court has a duty to engage in a Press-Enterprise I test before it can override the public's interest to attend the trial, regardless of the failure of the defendant to object to the closure. Although it may not have been necessary in *Press-Enterprise I* to "allocate the right to openness as between the accused and the public," it is now time to resolve any ambiguity left open in *Press-Enterprise I* and *Gannett*. This Court should grant the petition herein, should explicitly rule that the public has a right to attend criminal trials inherent in the Sixth Amendment, and should define the duty of a trial court to protect the right.

This duty must be defined because the measures stated by the Court to insure the public's right to attend trials are meaningless in application. In his concurring opinion in *Gannett* Justice Rehnquist asserted that the constitutional rights to a public trial were never violated so long as the parties stipulated to the closure. *Gannett Co. v. DePasquale*, 443 at 403-406. "Justice Rehnquist's concurrence was the only opinion that confronted the scope of the majority's analysis. . . he found that the federal Constitution provided no rights for the public to attend a pretrial hearing, or even a trial, if the accused and the state decided to hold one in secret." McDaniel, *Public Trials*, 8 HAMLINE L. REV. 127, 135.

Following the suggestion in Justice Rehnquist's concurrence, for the first time in the history of English or American jurisprudence, an entire criminal trial was closed to the public by agreement of the parties. See, *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980). In order to correct such an untenable situation the Court fashioned a right, belonging to both the press and general public, to attend criminal trials derived from a conglomeration of First Amendment concerns. By virtue of the *Richmond* holding neither the court, prosecutor or defendant could infringe upon the right of the press and public by agreement or acquiesence.

As noted previously, Justice White concurred in the *Richmond* result, but stated the case would have been unnecessary had *Gannett* construed the Sixth Amendment to forbid excluding the public from criminal proceedings except in narrowly defined circumstances, as urged by the dissenters. From this opinion, it may be inferred that Justice White believes a trial judge has a duty to determine whether closure of a trial is justified under particular, and narrowly defined, circumstances before the public may be excluded from a trial. This duty attaches regardless of the acquiescence or failure to object of the defendant.

The *Kersey* case illustrates the illusory nature of the protection afforded the general public by *Richmond*, and calls for the more appropriate protection urged by the *Gannett* dissenters. The *Richmond* protection does not work because it was founded upon the First Amendment; and, unless the press is also excluded from the courtroom, there will be no one to champion the cause of the excluded members of the public.

As evident by the cases analyzed herein, the press vigorously defends its right to attend trials. Because the press has an explicit first amendment right to attend trials it has never been necessary for this Court to decide whether they, in the broader sense as members of the general public, also have such a right grounded in the Sixth Amendment. Needless to say members of the general public, unconnected with the media, have never pressed for their rights under the Sixth Amendment in this or any other court; and, in practical terms, they are unlikely to ever do so.

As acknowledged in *Richmond* the public has an independent right to attend trials grounded in the First Amendment. To insure that right the court has recognized that the general public should be given an opportunity to object before a closure order is entered. See, *Gannett Co. v. DePasquale*, 443 U.S. at 401 (Powell, J. concurring). The grant of such an opportunity is verbal insurance with no protection in actual practice. In practical terms the parties by agreement, or acquiescence can still destroy the right of the general public to attend trial proceedings just as they did in *Richmond*. Now, in order to close a proceeding by agreement all the parties have to do is to provide an

opportunity for the press to attend. In other words the party seeking to close the proceeding, whether it be the judge, defendant or prosecutor, merely need suggest that all parties *except* the press be excluded.

In reality, the right of the general public to contemporaneously object when a judge or other party attempts to exclude them is illusory. Unlike the press which actively seeks to maintain its right to access and is acutely aware of its rights, the general public or a specific individual in the general public has little recognition of the rights granted to him by the decisions of *Press-Enterprise I, Globe Enterprises,* and *Waller*. It is unlikely that anyone present in the courtroom at the trial of the defendant would have taken it upon himself to verbally object to the procedure of the trial court in closing the proceedings. In the present case no member of the public was knowledgeable or strong-willed enough to shout "I object" as the judge announced he was clearing the courtroom. The only objections which were heard were the pitiful protestations of the relatives as they were booted from the courtroom.

The grant of a First Amendment right to the public to attend trials is circumvented in its practical application because the public has, in all likelihood, little knowledge of its rights, is unaware that it can object to a closure order and as a practical matter will never seek to vindicate the denial of the right. Kersey has standing to complain of the violation of his grandparents' right to attend his trial because of the inextricable relationship between the parties. He had a right to have them there, and they had a right to be there. Their presence could only have been beneficial to their grandson.

This Court should address the question of the source of the grandparents' public trial rights. If the Court finds there is an independent right of the public to attend trials grounded in the Sixth Amendment then a trial court would be required to comply with the *Press-Enterprise I* test even if a defendant did not object, all as originally argued by the *Gannett* dissenters when the current public trial analysis began.

ARGUMENT III

WHETHER THE EXCLUSION OF THE GENERAL PUBLIC DURING THE TESTIMONY OF THE COMPLAINING WITNESS, OTHER THAN THE PRESS AND RELATIVES OF THE VICTIM, CONSTITUTES A PARTIAL CLOSURE RATHER THAN A TOTAL CLOSURE, THUS JUSTIFYING THE EMPLOYMENT OF A SUBSTANTIAL AS OPPOSED TO A COMPELLING REASON FOR CLOSURE?

The Florida Second District Court of Appeal may have unconstitutionally circumvented the requirements for closure set forth by the Supreme Court in *Press-Enterprise I* and *Waller*. Various federal appellate courts surely have done so by employing a less-stringent test than the one demanded by this Court. A distinction which these courts read into *Press-Enterprise I* and *Waller* effectively eviscerates the holdings therein.

The historical presumption of openness of a public trial proceeding may be overcome and the courtroom closed only by an overriding interest for closure; the closure must be no broader than necessary to protect that interest; reasonable alternatives must be considered; and the trial court must make findings adequate to support the closure. *Press-Enterprise Co. v. Superior Court*, 464 U.S. at 510; *Waller v. Georgia*, 467 U.S. at 48.

In *Press-Enterprise I* the trial court excluded the press and public from the jury voir dire in a murder case. The press objected. After the jury was empaneled the press moved for a transcript of the voir dire proceedings. A hearing was held on the motion and the request was denied. The trial court advanced two interests in support of its closure order and denial of a transcript: the right of the defendant to a fair trial and the right to privacy of the prospective jurors. The Court then turned to whether on this record the presumption of openness was rebutted, and determined:

> Of course the right of an accused to fundamental fairness in the jury selection process is a compelling interest. But the California court's conclusion that Sixth Amendment and privacy interests were sufficient to warrant prolonged closure was unsupported by findings showing that an open proceeding in fact threatened those interests; hence it is not possible to conclude that closure was warranted. Even with findings adequate to support closure, the trial court's orders denying access to voir dire testimony failed to consider whether alternatives were available to protect the interests of the prospective jurors that the trial court's orders sought to guard. Absent consideration of alternatives to closure, the trial

court could not constitionally close the voir dire.
Press-Enterprise Co. v. Superior Court, 464 U.S. at 510-511, 78 L.Ed.2d at 638-639.

In *Waller*, the trial court ordered a pre-trial suppression hearing closed to the public at the request of the state. The suppression hearing involved evidence derived from wiretaps which included information concerning individuals not on trial. The Georgia Supreme Court approved the closure based upon the interest in protecting the privacy of persons not before the court. *Waller* applied the test espoused in *Press-Enterprise I* to determine whether the interest advanced and the record made was sufficient to overcome the presumption of openness. The Court determined the test was not met because the State's proffer was not specific as to whose privacy interests might be infringed, how they would be infringed, what portions of the tapes might infringe them, and what portion of the evidence consisted of the tapes. As a result, the trial court's findings were broad and general, and did not purport to justify closure of the entire hearing. The trial court did not consider alternatives to immediate closure of the entire hearing, such as by closing only those parts of the hearing that jeopardized the interest advanced. *Waller v. Georgia*, 467 U.S. at 48-49, 81 L.Ed.2d at 40.

In *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 596, the Court struck down a state law which required trial judges to exclude the public and press from the courtroom during the testimony of underage sex offense victims. The Court acknowledged that the protection of minor victims from trauma and embarassment while testifying was a compelling reason which could justify closure, but ruled that even such a compelling interest did not justify a mandatory closure rule in every case. In dictum the Court commented that a case-by-case closure determination would be constitutional. Among the factors to be weighed in making such a determination are the victim's age, psychological maturity and understanding, the nature of the crime, and the desires of the victim. Additional considerations should be whether the victim has given testimony before, and whether she is willing to testify at trial despite the presence of the public.

If the situations presented and interests advanced in *Press-Enterprise I*, *Waller*, and *Globe Newspaper* failed to justify closure of the courtroom, then the circumstances of the exclusion of the public during Cheryl Peters' testimony surely were not sufficient to rebut the presumption of openness. Peters was not a minor, but was nineteen years old. She had related her version of the incident to different individuals on various occasions. She had not expressed any unwillingness to testify. Further, if there was a justifiable interest warranting the exclusion of spectators during Peters' testimony, the exclusion of the Defendant's family made the closure broader than necessary to

protect any such interest. No alternatives to this exclusion of the grandparents was even considered when it became evident that they wanted to stay. Finally, any interest of Cheryl Peters in excluding the public is supposition since absolutely no findings were made adequate to support the closure. The interest that was advanced was based on an erroneous concept of law. There is no way the trial court established an overriding or compelling interest constitutionally sufficent to rebut the historical presumption of the openness of Kersey's trial.

All these deficiencies were argued to the Florida District Court of Appeal. In response, the State relied upon *Douglas v. Wainwright*, 739 F.2d 531 (11th Cir. 1984) to justify the closure, and argued that the exclusion of the general public during the testimony of one witness was only a partial closure of the trial proceeding; therefore, only a "substantial" rather than a "compelling" reason for the closure was necessary. The United States Court of Appeals, Eleventh Circuit originally rejected defendant Douglas' habeus corpus claims regarding denial of his public trial right in *Douglas v. Wainwright*, 714 F.2d 1532 (11th Cir. 1983). Douglas claimed his rights were violated by the exclusion of members of the general public during the testimony of the prosecutor's key and only eyewitness. He argued alternatively that even if the exclusion did not violate his public trial right per se, the trial judge's failure to hold a hearing on the exclusion motion or to make findings as to the necessity for the closure violated his Sixth Amendment right. Following the rejection of his claim the Supreme Court, 468 U.S. 1206, 104 S.Ct. 3575, 82 L.Ed.2d 874, granted a petition for writ of certiorari, vacated the judgment and remanded for further consideration in light of *Waller v. Georgia*. On remand the Circuit Court reaffirmed the original denial of habeus relief. The circuit court concluded the different results in *Douglas* and *Waller* were not attributable to different legal standards, but to the application of the same legal standards to dissimilar facts. The circuit court then found the most distinguishing factor was that *Waller* involved a total closure of a portion of the trial, while *Douglas* entailed only a partial closure, as the press and family members were allowed to remain. *Douglas v. Wainwright*, 739 at 532-533. Because the circuit court believed only a partial closure was involved, it relied on what it felt to be the binding precedent of *Aaron v. Capps*, 507 F.2d 685 (5th Cir. 1975), although that case pre-dated this Supreme Court's entire line of public trial analyses. The Eleventh Circuit Court concluded that the impact of the closure in *Douglas* was "not a kind presented when a proceeding is totally closed to the public," 739 F.2d at 533, and therefore only a "substantial" rather than "compelling" reason for the closure was necessary. The circuit court found that a substantial reason — protection of the witness from unnecessary insult to her dignity — existed

that justified the partial closure. If it is correct in distinguishing the *Press-Enterprise I* and *Waller* compelling interest test, then the *Douglas* decision would authorize the exclusion of the public from the testimony of every complaining witness in every rape trial.

By the gloss the Eleventh Circuit read into this Court's public trial cases, a new and less-stringent test to measure closure requests has been created. None of the cases analyzed above, *Gannett, Richmond, Globe Newspapers, Press-Enterprise I* nor *Waller* suggest that any interest otner than a compelling one — or one sufficient to override the right to a public trial — may ever justify closing the courthouse doors. The *Douglas* court has confused the balancing test set forth in *Press-Enterprise I* and *Waller*. Once an overriding interest has been advanced a trial court may issue a closure order, but the order must be no broader than necessary to protect the interest advanced. In other words, if the interest is sufficient a partial closure might be acceptable. The Circuit Court has the test backwards. A partial closure does not warrant consideration of merely a substantial interest.

Unfortunately, various other federal courts have seized this rationale espoused in *Douglas* and also have tried to distinguish this Court's compelling or overriding interest test promulgated in *Press-Enterprise I* and *Waller*. See, *Nieto v. Sullivan*, 879 F.2d 743, 753 (10th Cir. 1989); *United States v. Sherlock*, 865 F.2d 1069 (9th Cir. 1989), in which the test for closure was weakened still further. In *Nieto* the trial court excluded the press and the general public, including the defendant's relatives, from the courtroom during the testimony of one witness. The Tenth Circuit Court approved this closure based on the "partial closure" test espoused in *Douglas*. 879 F.2d at 743. Such a result further departs from this Court's historical analysis of the right to a public trial.

In Kersey's case, the Florida Second District Court of Appeal could not have affirmed the trial court's closure based upon this Court's compelling or overriding interest test. The factual circumstances and the record made simply do not comply with the *Press-Enterprise I* test. The only way the closure logically could have been sustained was by the adoption by the Florida appellate court of the less stringent substantial reason test employed in the context of partial closures, as argued by the State in the direct appeal.

No legal precedent from this Court exists for the establishment of the less stringent test. The use of some lesser standard than called for by this Court results in an unconstitutional violation of the defendant's public trial rights. This Court should grant the Petition for Writ of Certiorari to clarify whether or not there can ever be a partial closure of a trial justifying a less stringent requirement for closure than the test set forth in *Press-Enterprise I* and *Waller v. Georgia*.

CONCLUSION

Floyd Kersey's right to a public trial was violated by the exclusion of the general public, including his family, during the testimony of the complaining witness.

Granting this Petition for Writ of Certiorari will, on an individual basis, vindicate the denial of his right.

On a societal level, granting the Petition will allow this Court to specifically place the right to a public trial in the proper constitutional hierachy by deciding whether the right can be waived by the failure of a defendant to object. If the right is as basic to our system of justice as the historical analyses of this Court suggests, then the opinions of those lower courts that feel it is not a significant right should be set straight.

In addition this case provides a unique vehicle for the Court to decide explicitly whether the general public has a Sixth Amendment right to a public trial.

Finally, the Court may determine whether the federal appellate courts were correct in their attempts to factually distinguish the test to be employed in rebutting the presumption of openness before closing trial proceedings. If there is a less-stringent requirement that may be employed other than the test set forth in *Press-Enterprise I* and *Waller*, it should be so acknowledged by this Court.

It has been remarked that a courthouse is a "theatre of justice." 1 J. BENTHAM, THE RATIONALE OF JUDICIAL EVIDENCE (J. Mill ed. 1827). If so, it should be played to a packed house, with admission denied only for compelling reasons.

Respectfully submitted,

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APPENDIX

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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

FLOYD B. KERSEY, III,

Appellant,

v.

Case No. 89-03294

STATE OF FLORIDA,

Appellee.

Opinion filed December 14, 1990.

Appeal from the Circuit Court for Pasco County; Maynard Swanson, Judge.

A.R. Mander, III, of Greenfelder, Mander, Hanson & Murphy, Dade City, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Wendy Buffington, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Affirmed.

SCHOONOVER, C.J., and CAMPBELL and PARKER, JJ., Concur.

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

MARCH 5, 1991

FLOYD B. KERSEY, III,

Appellant(s),

v.

STATE OF FLORIDA,

Appellee(s).

Case No. 89-03294

Counsel for appellant having filed a motion for rehearing, clarification, certification and motion for rehearing en banc in the above-styled case, upon consideration, it is ORDERED that said motions are hereby denied.

A TRUE COPY
ATTEST:
William A. Haddad
WILLIAM A. HADDAD, CLERK
SECOND DISTRICT COURT OF APPEAL

c: A.R. Mander, III, Esq.
Wendy Buffington, Esq.

/PM

[Kersey brief, p.15]

ARGUMENT I

THE TRIAL COURT'S EXCLUSION OF THE GENERAL PUBLIC, INCLUDING DEFENDANT'S RELATIVES, FROM THE COURTROOM DURING THE PROSECUTRIX' TESTIMONY VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL.

The trial judge erroneously excluded the public from the courtroom during the testimony of the prosecutrix, Cheryl Peters. The press and the immediate family of the prosecutrix were allowed to remain in the courtroom; however, the Defendant's friends and relatives, as well as the general public, were excluded. The trial court's exclusion was based on a mistaken belief that there had been a constitutional amendment concerning victim's rights which would permit the exclusion. The specific colloquy occurring at the beginning of the trial is set forth as follows:

> THE COURT: Call your first witness, please.
> MR. ATTRIDGE: Cheryl Peters.
> THE BAILIFF: Please, raise your right hand and take the oath.
> Thereupon,
>
> CHERYL PETERS
>
> the witness herein, being first duly sworn, was examined and testified as follows:
> THE COURT: By reason of the nature of the testimony, all persons not directly related to the witness, all persons not witnesses, are hereby excluded from the courtroom. All persons are hereby excluded from the courtroom except for the press and except for those either parents or spouse of the victim. All other persons must leave the courtroom, all but the victim.
> Okay. You may proceed.
> MR ATTRIDGE: Judge, these people are not related to the victim.
> UNIDENTIFIED PERSON: We're the grandparents.
> MR. ATTRIDGE: They're not related to the victim.
> THE COURT: They're excluded from the courtoom. All persons not related to the victim are hereby excluded from the courtroom by reason of the constitutional amendment on victim's rights. All persons are excluded from the courtroom unless they're the spouse of the victim.
> THE DEFENDANT: Grandpa, you're not a victim.
> MR. ATTRIDGE: May it please the Court.

[Kersey brief, p.16]

(R. page 134, lines 16-25; page 135, lines 1-17)

The only constitutional amendment concerning victim's rights is set forth below:

> (b) Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused. Article I, Section 16(b), Florida Constitution

The amendment says nothing regarding the exclusion of spectators, nor is there any other constitutional amendment which does.

While not authorized by amendment, the exclusion of some classes of spectators in sex abuse cases involving children is discussed in §918.16, Fla.Stat. (1987), set forth as follows:

> **918.16 Sex offenses; testimony of person under age 16;** courtroom cleared; exceptions. - In the trial of any case, civil or criminal, when any person under the age of 16 is testifying concerning any sex offense, the court shall clear the courtroom of all persons except parties to the cause and their immediate families or guardians, attorneys and their secretaries, officers of the court, jurors, newspaper reporters or broadcasters, and court reporters.

It is possible the trial court combined §918.16, Fla. Stat., and Article I, Section 16, Florida Constitution,

[Kersey brief, p.17]

as the basis for his exclusion. At any rate, no matter the rationale the articulated basis for the exclusion was clearly wrong, an abuse of discretion and deprived the Defendant of his right to a public trial. The prosecutrix in this case was a young women, 19 years of age, to whom the exclusions of §918.16, Fla.Stat. (1987), would have been inapplicable. Even if the prosecutrix had been a child there would have been no statutory bases for excluding the Defendant's immediate family. It should be noted that there is no recognized authority allowing the exclusion of a Defendant's relatives from the trial of the case. *Gannet Co. v. De Pasquale, 443 U.S. 368, 61 L.Ed2d 608, 653 nill, 99 S.Ct. 2898 (1979)* Finally, there has been no change in the Florida or United States Constitutions regarding victim's rights which would support the exclusion.

The only relevant constitutional amendments are those guaranteeing Kersey's right to a public trial, as provided by the Sixth Amendment of the United States Constitution, and the Due Process Clause of the Fourteenth

Amendment which requires that in criminal cases all States act in conformity with the public-trial provision of the Sixth Amendment. *Duncan v. Louisiana*, 395 U.S. 145, 148, 20 L.Ed2d 491, 88 S.Ct. 1444, 45 Ohio Ops 2d 198 (1968); *In re Oliver*, 333 U.S. 257, 92 L.Ed 682, 68 S.Ct. 1065 (1948)

The right to a public trial is also guaranteed to Kersey by Article I, Section 16(a) of the Florida Constitution. The fundamental nature of the right to a public trial is

[Kersey brief, p.18]

further evidenced by the fact that provision for such a guarantee is provided for in practically all jurisdictions, either by constitution, statute or by judicial decision. See, *In re Oliver*, supra 92 L.Ed.2d at page 691.

A cursory examination of the history of public trials indicates clearly that it is a procedure we Americans have traditionally found to be fundamental to our Anglo-American regime of ordered liberty. This nation's accepted practice of providing open trials in both federal and state courts:

> "has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."

In re Oliver 333 U.S. 257, 270, 92 L.Ed 682, 68 S.Ct. 499 (1948)

> our nation's accepted practice of guaranteeing a public trial to a Defendant is based on our English common law heritage. The exact date of its origin is obscure but it likely evolved long before the settlement of our land as an accompaniment of the ancient institution of jury trial.

In re Oliver, supra 92 L.Ed.2d at page 690, 691

> The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the letter de cachet. All of these institutions obviously symbolized a menace to liberty. In the hands of despotic groups each of them had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial.

[Kersey brief, p.19]

In re Oliver, supra 92 L.Ed.2d at page 691, 692

In addition to the safeguards against persecution openness in Court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously, and generally give the public an opportunity to observe the judicial system. *Gannett Co. v. De Pasquale*, 444 U.S. 368, 382, 61 L.Ed2d 608, 99 S.Ct. 2898 (1979).

The Defendant acknowledges that a criminal Defendant is not entitled to a public trial in every case on every issue as an absolute right. *Rovinsky v. McKaskle*, 772 F.2d 197 (5th Cir. 1984) The right to a public trial is subject to limitation in the sense that certain segments of the public or certain individuals may be excluded from all or a portion of a trial. For example, spectators may be excluded to avoid overcrowding, to preserve order in the Court, to maintain the confidentiality of undercover police officers, to protect the confidentiality of certain information, and to protect the Defendant or witnesses. *United States ex rel Lloyd v. Vincent*, 520 F.2d 1272 (2d Cir. 1975) with citations.

There are numerous jurisdictions that allow the limited exclusion of spectators during the testimony of an alleged victim in sex offense cases. Florida is one of them. In *Robertson v. State*, 64 Fla. 437, 60 So. 118 (1912)

[Kersey brief, p.20]

the general public was excluded from a criminal trial except the "court officers, the jury, witnesses, attorneys representing the parties, and all persons directly interested in the case." The Court found, "The exclusion by the Court of all persons other than those interested in the case, where, from the character of the charge and nature of the evidence, public morality would be injuriously affected, does not violate the constitutional right to a public trial."

In *Bivins v. State*, 313 So.2d 471 (Fla. 4th DCA 1975) the Court excluded all spectators except those authorized under §801.231, Fla.Stat. (1975), during the testimony of the prosecutrix. §801.231, Fla.Stat. (1975), was repealed in 1977 c. 77-312, §31, effective July 1, 1977, but is set forth below:

> **801.231 Sex offenses; trial of person under age 16; courtroom cleared; exceptions.** - In the trial of any case, civil or criminal, when any person under the age of 16 is testifying concerning any sex offense, the court shall clear the courtroom of all persons except the parties to the cause and their relatives, attorneys and their secretaries, officers of the court, jurors, newspaper reporters or

broadcasters, and court reporters, which shall constitute a public trial within the meaning of s.16, Art. I of the State Constitution.

The statute set forth the minimum requirements of spectators for a public trial. They included relatives and the press. The court felt the exclusion appropriate citing the following passage in *Robertson:*

[Kersey brief, p.21]

> "The word 'public', as used in the Constitution guaranteeing to all persons accused of crime a public trial, is there used in opposition to 'secret'. The constitutional requirement is fairly observed, if, without partiality or favoritism, a reasonable portion of the public is suffered to attend, nothwithstanding that those persons whose presence would be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether."

The Court found in *Douglas v. State*, 328 So.2d 18 (1976) that the statement of law espoused in *Robertson* was still applicable. In *Douglas*, the trial court excluded every one except court personnel, the press, and members of the families of the Defendant, the victim and the witness. The basis for the exclusion was that the nature of the testimony was so embarrassing that there was no reason that anybody should hear it unless necessary.

A limited exclusion was also found acceptable in *Rodriguez v. State*, 424 So.2d 893 (Fla. 3d DCA 1982), citing to *Robertson* and *Douglas*. The exclusion in *Rodriguez*, like *Douglas* and *Robertson* only applied to a portion of the public.

The limited nature of the exclusion is the factor which renders the action constitutional in all the Florida cases. In fact, there are no reported cases approving the type exclusion made by the trial court in this case. As noted *In re Oliver*, supra 92 L.Ed.2d at page 693,

> "And without exception all courts have held that an accused is at the very least entitled to have his friends, relatives, and counsel present, no matter with what offense he may be charged."

[Kersey brief, p.22]

The right to a public trial is personal to the accused *Gannett Co. v. De Pasquale*, supra 61 L.Ed.2d at page 621 and, in addition to serving the useful purpose of improving the quality of testimony, it also enables the accused to be accompanied by friends and relatives that lend moral support and comfort. See, *Commonwealth v. Marshall*, 253 N.E.2d 333 (Mass. 1969)

In every case, the trial court must make findings sufficient to show the need for the exclusion, and the remedy should not be greater than necessary. *United States ex rel Lloyd v. Vincent*, 520 F.2d 1272 (2d Cir. 1975)

If the trial court improperly excludes the public, prejudice is implied and an affirmative showing that the Defendant was harmed is unnecessary to justify reversal. This is the unquestioned rule in federal courts. *United States v. Hernandez*, 608 F.2d 741, 747 (9th Cir. 1979); *Martineau v. Perrin*, 601 F.2d 1196, 1198 (1st Cir. 1979); *United States ex rel Latimore v. Sielaff*, 561 F.2d 691, 694 (7th Cir. 1977); *United States v. Eisner*, 533 F.2d 987, 993 (6th Cir. 1976); *United States ex rel Bennett v. Rundle*, 419 F.2d 599, 608 (3d Cir. 1969) The rule is clear since a "violation of the constitutional right necessarily implies prejudice and more than that need not appear. Furthermore, it would be difficult, if not impossible in such cases for a Defendant to point to any definite, personal injury. To require him to do so would impair or destroy the safeguard." *U.S. v. Kobli*, 172 F.2d 919 (3d Cir. 1949)

[Kersey brief, p.23]

Moreover, the rule is not changed by a harmless error statute, prohibiting reversal for errors which do not affect the substantial rights of the parties. *Tanksley v. United States*, 145 F.2d 58 (9th Cir. 1944)

Although a showing of prejudice is not ordinarily required, the manner in which the trial court ordered the exclusion in this case was in fact prejudicial. Recall the exclusion was ordered in open court. The better procedure would have been to discuss the issue out of the presence of the jury. Instead, in the presence of the jury, the trial judge and prosecutor repeatedly referred to Cheryl Peters as the *victim*. In fact, at that point in the trial, she was no more than a witness. To accord her any special treatment in the presence of the jury destroyed the Defendant's presumption of innocence. As stated by Justice England in his dissenting opinion in *Douglas v. State*, supra at page 23

> "Solicitude for a witness cannot justify sacrifice of a criminal Defendant's constitutional guarantees. The credibility of a witness is given official emphasis when a trial judge relieves the witness of "embarrassment because she is 'called upon to testify to the story of the Defendant's crime and her shame."

quoting from *Tanksley v. United States*, supra at page 59.

While an actual showing of prejudice is not needed to reverse for denial of a Defendant's fundamental right to a public trial, in the instant case there was prejudice which exacerbates the harmfulness of the error.

[Motion for rehearing, p. 1]

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

SECOND DISTRICT

FLOYD B. KERSEY, III,

Appellant,

vs Case No. 89-03294

STATE OF FLORIDA,

Appellee.

_____ /

MOTION FOR REHEARING, CLARIFICATION, AND CERTIFICATION

COMES NOW the Appellant, FLOYD B. KERSEY, III, by and through the undersigned counsel and respectfully moves this court, pursuant to Fla.R.App.P. 9.330, for a rehearing, clarification, and certification of the per curiam opinion filed herein on December 14, 1990 which affirmed the judgment of the lower court. In support of this motion counsel states as follows:

REHEARING

Careful analysis indicates two points of law which this court may have overlooked or misapprehended. See, *Whipple v. State*, 431 So.2d 1011 (Fla. 2d DCA 1983); Fla.R.App.P. 9.330(a). Both parties filed Notices of Supplemental Authority after the last briefs were served in the above cause. The State provided *Dixon v. State*, 191 So.2d 94 (Fla. 2d DCA 1966), and the Defendant provided *Pritchett v. State*, 566 So. 2d 6 (Fla. 2d DCA 1990). The notices were submitted without argument, pursuant to Fla.R.App.P. 9.210(g). Accordingly, this court may have overlooked the precedential value of *Pritchett* and/or misapprehended the precedential

[Motion for rehearing, p. 2]

value of *Dixon*.

I.

Dixon v. State should not control the outcome of the instant case. In the

present case there was an exclusion of the general public, including Defendant's relatives, from the courtroom during the prosecutrix' testimony. There was no objection by the Defendant in the trial court to the exclusion.

Dixon, too, involved a sex offense case in which the trial judge cleared the courtroom on his own initiative without objection from the Defendant. On appeal the district court summarily disposed of the closure issue by noting that there was no objection made during trial, nor was it mentioned in a motion for new trial or in the assignments of error.

It was apparent from oral argument that the panel relied upon the *Dixon* case in reaching its decision on the public trial issue. The Defendant feels it fair to assume that the panel's PCA decision was based on a waiver of the public trial issue by Defendant's failure to object because the exclusion clearly violated the Defendant's right to a public trial, as recognized by the overwhelming weight of authority.

Dixon is not good law to support a waiver for the following reasons:

1. The *Dixon* case was reversed on other grounds unrelated to the closure issue. An appellate court's decision rests upon the most narrow ground available; therefore, it was not necessary for the *Dixon* court to reach the exclusion issue. The court's pronouncements in *Dixon* regarding the exclusion of the public

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were not necessary to support the holding and were dicta without precedential value. The opinion itself indicated that the exclusion issue was summarily disposed of, arguably, not because it was unimportant but because it was not necessary to determine the issue on its merits in order to resolve the case. It is interesting to note that the constitutional ramifications were never considered in *Dixon*. The closure was never reviewed as a "public trial" problem, nor were the constitutional requirements of the U.S. and Florida ever mentioned.

2. *Dixon* was decided in 1966 under former Fla.App.R. 3.5 which required an assignment of error to enable the appellate court to review errors. Under the former practice, assignments of error that were not mentioned, discussed, or argued in the appellant's brief were deemed abandoned and could not be argued orally. See, 3 Fla.Jur.2d, Appellate Review §108. Accordingly, the *Dixon* court refused to review the exclusion issue because of failure to comply with the appellate rules concerning assignments of error. The comment in dicta that there had been no objection to the exclusion could not form the basis for a waiver since the court could not reach the issue. The *Dixon* case does not stand for the proposition that a failure to object waives a public trial right because the court could not reach that issue due to the lack of

an assignment of error.

3. *Dixon* was decided in 1966 prior to almost all of the public trial cases relied upon in Defendant's brief, especially the "access cases" such as *Waller v. Georgia*, 467 U.S. 39, 104

[Motion for rehearing, p. 4]

S.Ct. 2210, 81 L.Ed2d 31 (1984). The *Dixon* case is inconsistent with this authority. This court's own decision in *Pritchett v. State*, the question of the objection not withstanding, raises issues and dimensions not even suggested in *Dixon* which preclude reliance upon it as a basis for the opinion herein.

4. Interestingly §801.231, Fla.Stat., since repealed, was enacted in 1967 and 1969 immediately after *Dixon*. The statute set forth minimum requirements that defined what constituted a public trial sufficient to satisfy Art. I., Section 16 of the Florida Constitution. The exclusion in *Dixon* would not satisfy the statute, or the requirements set forth in the later controlling case of *Douglas v. State*, 328 So.2d 18 (Fla. 1976) because it did not allow relatives of the Defendant to remain in the courtroom.

5. Finally, *Dixon* fails to consider the many U.S. Supreme Court cases refining the requirements for waiver of fundamental constitutional rights. See, *Fay v. Noia*, 327 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1961) [waiver of a constitutional right may occur only when the accused *himself*, knowing of the existence of his right, has deliberately by-passed the right.]; *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed 1461 (1938).

II.

Pritchett v. State should be strongly relied upon by this court in reaching its decision. *Pritchett* was the case noticed by Defendant as supplemental authority and it may not have been

[Motion for rehearing, p. 5]

sufficiently explored during oral argument. It should not be overlooked since, unlike *Dixon*, it is a new case in touch with modern procedural rules and recent constitutional decisions.

In *Pritchett* the trial court cleared the courtroom of all spectators during the testimony of a minor victim in a sex battery case. This was over the objection of the Defendant. The court reversed the closure based upon *Waller v. Georgia*, supra. because the trial court failed to make any findings to justify the closure. Arguably, such findings are necessary regardless of whether an objection is made or not. It would not seem logical to require the *Pritchett* analysis to be formed only after an objection to an attempt to close a courtroom because there is a presumption of openness. At any rate, the extent of the objection necessary to trigger a *Pritchett* analysis is a factor that appears to have been overlooked by this court.

In sum, this court appears to have misapprehended the holding in *Dixon*. *Dixon* does not hold that a failure to object waives a public trial right. On the other hand, it also appears the court overlooked the analysis required by *Pritchett*. This court upon rehearing should evaluate these two cases in the specific context of the waiver issue.

CLARIFICATION

Clarify means to make understandable. Usually, there would have to be a written opinion in order to obtain a clarification; however, under the particular issues of the present case a clarification of the court's PCA is essential. As argued above, *Dixon*

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v. State does not hold that a failure to object waives a public trial right. No Florida case has ever ruled on the issue. In fact, as acknowledged by the State, the prosecution could not discover any controlling law regarding the waiver of a public trial right. Moreover, the United States Supreme Court has not addressed the question of whether failure by a Defendant and his counsel to object to a closure order constitutes waiver of the right under the Sixth Amendment.

A written opinion is in order to show conflict in law or when it would be of significant assistance to the bench or bar of this State. See, *Whipple v. State*, supra at p. 1012. If the PCA was based on the Defendant's failure to object a written clarification is appropriate since there is no case law in Florida supporting such a result, nor is there any such U.S. Supreme Court authority. A finding that a failure to object waives the right to a public trial certainly would assist the bench or bar in general, and in particular would assist the trial court which yet may have to consider the issue in an effectiveness context.

On the other hand, if the PCA was not based on waiver, as assumed, then the decision tacitly conflicts with the authority cited in Defendant's brief which does not permit such a broad exclusion of the public at trial. If this panel genuinely believes that a public trial may be had by the exclusion of everyone but the press and relatives of the victims then the bar would be significantly assisted by such a written clarification.

A clarification of the opinion is also necessary to understand

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the other issues. A short written opinion clearly would affirm that the proffer procedure employed by the court is acceptable. Specifically, it would acknowledge that the rape shield statute is satisfied by proof of consistency with the *victim's* version rather than the Defendant's version of an occurrence.

Additionally, clarification of issue four would make it clear to the bar that expert medical evidence is not necessary to prove sexual battery by use of actual physical force likely to cause serious personal injury under §794.011(3), Fla.Stat.

CERTIFICATION

The per curiam affirmance in regard to Defendant's issue two creates a direct conflict with the decision of the first District Court of Appeal in *Simpkins v. State*, 395 So.2d 625 (Fla. 1st DCA 1981) and with the decision of the Fifth District Court of Appeal in *Hrindrich v. State*, 427 So.2d 212 (Fla. 5th DCA 1983). *Hrindrich* applied the principles expoused in *Faison v. State*, 426 So.2d 963 (Fla. 1983) and cited *Simpkins*. At oral argument the court asked the State to distinguish the facts of the instant case from *Simpkins* and the State did not do so. The Defendant's confinement of the victim was merely incidental to and not materially different from the type of confinement necessarily involved in the particular *type* of sexual battery Defendant was charged with. The confinement and movement of the victim in *Simpkins* exceeded the confinement and movement here. If the facts are undistinguishable the results should be the same. *Hrindrich* and *Simpkins* reversed the conviction

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while the conviction herein was affirmed. Therein lies the conflict.

WHEREFORE, the Appellant requests the court grant this motion and order a rehearing on the matters raised herein alleged to be overlooked or misapprehended. In the alternative the Appellant requests the PCA opinion be clarified by the addition of written reasons for the result. Finally, the Appellant requests certification that the instant decision conflicts with that of *Hrindrich v. State* , 427 So.2d 212 (Fla. 5th DCA 1983) and *Simpkins v. State*, 395 So.2d 625 (Fla. 1st DCA 1981).

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail, this 28th day of December, 1990 to Wendy Buffington, Attorney General's Office, Westwood Center, 2002 North Lois, Suite 700, Tampa, Florida 33607.

Respectfully submitted,

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By: /S/
A.R. Mander, III
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[Record page 134, lines 18-25]

THE COURT: Call your first witness, please.

MR. ATTRIDGE: Cheryl Peters.

THE BAILIFF: Please, raise your right hand and take the oath.

Thereupon,

CHERYL PETERS

the witness herein, being first duly sworn, was examined and testified as follows:

THE COURT: By reason of nature of the testimony, all persons not directly related to the witness,

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all persons not witnesses, are hereby excluded from the courtroom. All persons are hereby excluded from the courtroom except for the press and except for those either parents or spouse of the victim. All other persons must leave the courtroom, all but the victim.

Okay. You may proceed.

MR. ATTRIDGE: Judge, these people are not related to the victim.

UNIDENTIFIED PERSON: We're the grandparents.

MR. ATTRIDGE: They're not related to the victim.

THE COURT: They're excluded from the courtroom. All persons not related to the victim are hereby excluded from the courtroom unless they're the spouse of the victim.

THE DEFENDANT: Grandpa, you're not a victim.

MR. ATTRIDGE: May it please the Court.